

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO: 07-23381-CIV-GOLD/WHITE

STEPHEN L. WHITE,

Plaintiff,

v.

CORPORAL JAMES SMITH, AND
DETECTIVE ROLANDO DE LA OSA.

Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATIONS OF MAGISTRATE
JUDGE WHITE [DE 75]; GRANTING PLAINTIFF'S MOTION [DE 69]; GRANTING
DEFENDANT'S MOTION [DE 71]; DENYING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT [DE 48]; DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT [DE 52]

THIS CAUSE is before the Court upon Magistrate Judge White's Report and Recommendations [DE 75], entered December 2, 2009 (hereinafter, the "Report"). The Report recommends that Plaintiff's Motion for Voluntary Dismissal [DE 69] and Defendant James Smith's Motion for a Final Order of Dismissal [DE 71] be granted.

On December 28, 2007, Plaintiff Stephen L. White filed a *pro se* civil rights action pursuant to 42 U. S. C. § 1983 against two defendants, Miami-Dade police Detective Rolando De La Osa and Corporal James Smith of the Opa Locka Police Department. Plaintiff alleges that Defendants subjected him to false arrest and malicious prosecution. [DE 1]. On May 21, 2009, Defendant Smith filed a Motion for Summary Judgment. [DE 48]. In response to Defendant Smith's motion, Plaintiff White filed a Motion for Summary Judgment [DE 52] entered on May 28, 2009. Subsequently, Plaintiff White filed a motion requesting to "Amend Defendants" and stating that based on responses to discovery, he wished to remove Defendant Smith from the list of defendants and release him from all responsibilities in this matter. [DE 69]. Magistrate Judge, Patrick A. White issued a

paperless order granting Plaintiff's motion. **[DE 70]**. Consequently, Defendant Smith filed a Motion for entry of a Final Order of Dismissal to remove himself from the matter. **[DE 71]**.

Because this Court is granting Defendant Smith's Motion for entry of a Final Order of Dismissal **[DE 71]** thereby eliminating him as a party to this suit, his motion for Summary Judgment is denied as moot. Thus, the remaining issue in this matter is Plaintiff's Motion for Summary Judgment with respect to Defendant De La Osa. **[DE 52]**.

In accordance with Rule 56 (c), Summary Judgment¹ is warranted " if the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). The moving party bears the burden² to "show, by reference to materials on file, that there are no genuine issues of material fact to be determined at trial." *Mullins v. Crowell*, 228 F. 3d 1305, 1313 (11th Cir. 2000). In this case, the record shows that on numerous occasions, Plaintiff failed to effectuate a sufficient service of process on Defendant De La Osa pursuant to Federal Rules of Civil Procedure, Rule 4 (e) (2) (a) and (c). **[DE 9, 10, 14, 17, 19, 20, 22, 23, 25, 27, 29, and 30]**. Because Defendant De La Osa has not been afforded an opportunity to respond to the allegations in Plaintiff's complaint, Summary judgment is in appropriate as premature at this stage of the suit.

Having reviewed the record, the Report, and the applicable law, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Report and Recommendations **[DE 75]** is AFFIRMED AND ADOPTED.
2. Plaintiff's Motion to Amend Defendants **[DE 69]** is GRANTED.

¹ See *Lofton v. Sec'y of the Dept. Of Children and Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004) ("only factual disputes that are material under the substantive law governing the case will preclude entry of summary judgment.")

² See *Celotex Corp v. Cartrett*, 477 U.S. 317, 322 (1986) (holding that the non-moving party in a Summary Judgment motion must come forward with extrinsic evidence, which are sufficient to establish the existence of the essential elements to that party's case to defeat such motion)

3. Defendant Smith's Motion for entry of a Final Order of Dismissal [DE 71] is GRANTED. All claims against Defendant James Smith are dismissed.
4. Defendant Smith's Motion for Summary Judgment [DE 48] is DENIED AS MOOT.
5. Plaintiff's Motion for Summary Judgment [DE 52] is DENIED.
6. This case shall remain pending only against Defendant Rolando De La Osa.

DONE AND ORDERED in Chambers at Miami, Florida this 26 day of January, 2010.



THE HONORABLE ALAN S. GOLD
U.S. DISTRICT COURT JUDGE

cc:
U.S. Magistrate Judge Patrick A. White
All counsel of Record

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